CRIMINAL APPEAL NO.838 OF 1987.

Date of decision: 13.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr.P.M. Raval, Senior Counsel, for appellant.
Mr.K.P. Raval, A.P.P., for respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

February 13, 1996.

Oral judgment (Per Jain, J.)

Appellant/original accused has preferred this appeal against conviction under Section 302 of IPC passed by learned Additional Sessions Judge, Mehsana, in Sessions Case No.109 of 1986.

The matrix of the case in which the accused was charged

is as under:
That Gajiben, daughter of complainant- Pratapji Punjaji, resident of Siddhpur, was married to the appellant, Babuji Manaji, a resident of Koth village. As alleged, their matrimonial relations were not so cordial and were unable to march in step together and Gajiben frequently used to leave her husband and come to parental home. At the relevant time also, said Gajiben had left her husband/appellant and came to her parents' place since last more than a month. The incident occurred on 5.10.1985 when said Gajiben was her parent's place. At that time, said Gajiben was attending some household work in kitchen and her small son, aged about 9 months, was sleeping. Initially, the appellant had some talks with Gajiben and insisted her to accompany him. But, Gajiben, wife of appellant, was adamant and expressed negative attitude. At this juncture the appellant took out a knife and stabbed his own nine months old child, Kamlesh. Thereafter he also stabbed himself and caused injuries. Hearing screams and shrieks, neighbours also assembled there. As alleged, the appellant was caught hold by some of them and then was handed over to the police who came there subsequently. The injured child Kamlesh and the appellant, both were removed to hospital and were treated as indoor patients. But the child died after four days during the course of treatment. In this background, the appellant was chargesheeted for offence under Section 302 and 309 of IPC read with Section 135 (1) of the Bombay Police Act for killing his own child. However, the learned Additional Sessions Judge was pleased to convict the accused for offence under Section 302 of IPC only. This is how the appellant has come before this Court challenging the order of conviction.

Mr. P.M. Raval, learned Senior Counsel, appearing on behalf of the appellant, has referred to evidence of several witnesses including that of ocular witnesses with an attempt to convince the Court that the alleged act was the result of sudden and grave provocation, that is, obsessed by the obstinate attitude of his wife not to join him and, therefore, had no intention to cause death but unfortunately landed himself in the tragedy and committed the act in passion of heat. Thus, his endeavour is that though the appellant had knowledge but did not have intention to cause death and, therefore, without going into merits of the matter, has argued for alteration of sentence from Section 302 to Section 304 of IPC.

We have also heard learned A.P.P. Mr. K.P. Raval for the respondent-State, who has also taken us through the

evidence of all the material witness and has vehemently repelled the submissions made on behalf of the appellant. According to Mr. Raval, learned A.P.P., even assuming that the act was the result of grave and sudden provocation but nonetheless the deceased was the person who gave grave and sudden provocation and, therefore, by taking a liberal view also cannot be a mitigating circumstance for covering the case under exception 1 to Section 300 and to bring within the purview of Section 304 of IPC.

To appreciate rival contentions, it would be worthwhile to refer to the evidence of material witnesses as well as probable defence. Mr. Raval, learned advocate for the appellant, has invited out attention to various questions put under Section 313 of Cr.P.C. and the explanations coming forth from the appellant. In his examination under Section 313 of Cr.P.C., the appellant has come out with the case of total denial except explanation to the last question which was in the nature of probable defence. According to his explanation, at the relevant time, he had gone to his in-laws place for inviting his wife to join him at the matrimonial home. While talking with his wife, he attempted to take away his child but in the meanwhile, neighbours had assembled there and while coming to the rescue of his wife, some of them attempted to snatch away the child. During this incident, somebody had stabbed the child. Thereafter apprehending further attack on him, he himself went inside the room and bolted from inside. Now this defence leads us to draw following conclusions:

1. Undisputed presence of accused
2. Homicidal death of child
3. No satisfactory explanation for the injuries sustained by deceased child.

As a cardinal rule, the prosecution shall not rely upon and take advantage of the probable defence. But, at the same time, explanation tendered during examination under Section 313 of Cr.P.C. regarding probable defence is not sufficient for its acceptance. Right from the beginning, it is the bounden duty of the defence to make suggestions during cross-examination of witness projecting the probabilities and probable defence and make it convincing. Mr. Raval, learned A.P.P., has taken us through the cross-examination of each and every witness and we are sorry to say that we do not find even a single suggestion fortifying the probable defence explained by the accused during his examination under Section 313 of Cr.P.C. and, therefore, on the face of it, his explanation is after thought and cannot be considered as

a probable defence. We are unable to cull out any probable defence even may be other than one sought to be explained in the further examination, from the cross-examination of any of the witnesses.The cross examination is nothing else but a fishing inquiry which, in our view, is not sufficient to uproot the case of the prosecution.

The prosecution has examined P.W.6, Viramji Pratapji, Ex.29, and P.W.7, Balvantji Pratapji, Ex.31, as eye witnesses. Both are appellant's brothers-in-law (wife's brothers). P.W.6 has been firm enough to adhere to the prosecution story. His presence at the relevant time is natural and has not been challenged in cross-examination. He has categorically stated that at the relevant time, his sister (wife of accused) was attending kitchen and deceased Kamlesh was sleeping. In the meanwhile, the appellant came and gave fatal blows. On seeing this, appellant's wife came out from kitchen, took the child and shouted for help in response to which the neighbours had assembled there. This witness has not been shaken in the cross-examination, which as we said is fishing inquiry only. We also do not find any substance in the cross-examination and only suggestion made was that on account of strained relationship, the accused has been falsely implicated. Such a suggestion does not get any corroboration or support from the explanation given by the accused. The testimony of P.W.7, Balvantji Pratapji, Ex.31, also runs parallel to that of P.W.6. This witness is a child witness aged about 13 years and was examined only after making preliminary inquiry as is found from Ex.30. The learned trial Judge having satisfied that the witness understands the sanctity of oath, was examined on oath. In absence of any express challenge to testimony of both these witnesses on any of the counts, we find that the evidence of both these witnesses is reliable, credible and trustworthy. If this be so, there is nothing on record to suggest that at the relevant time there was a grave and sudden provocation from any of the persons even other than the deceased. Appellant's wife was attending kitchen whereas the innocent deceased child of 9 months was sleeping. The accused suddenly entered the house and without having any talk with anybody, gave fatal blows to the child, who, ultimately, after lapse of 4 days, succumbed to the injuries. When a person suddenly appears with a weapon like knife and stabs an innocent person, in our view, the circumstances itself are sufficient to infer intention of causing death. The circumstances are self-explanatory and nothing more is required to establish intention. As regards knowledge, we have no hesitation in saying that whosoever inflicts

stab wounds in stomach of a child aged about 9 months with a knife having blade of 5 1/2 inches approximately, knows it very well that the injuries are sufficient to cause death of a tiny child, in ordinary course of nature.

The prosecution has also examined appellant's wife, Gajaraben, P.W.5, Ex.28. Of course, she has turned hostile but then her evidence is sufficient to establish following facts:

1. Presence of both eye witnesses, that is, P.W.6 and P.W.7.
2. Presence of appellant/accused.
3. Sudden entry by accused.

Since this witness has turned hostile, some pertinent questions were asked by the Court. In reply to the questions, the witness has stated that when she was attending kitchen her husband - the accused had come there and took away the child inside the room. At the time when he took away the child, he was not injured. But when the child started crying and weeping, she went inside and saw that he was injured and injury was so grave that the intestine had also come out. She has further stated that at the relevant time, except the ill-fated child and the appellant, none else was present there. To our surprise, both the parties accepted this version and neither prosecution nor defence further cross-examined and, therefore, this fact brought out in evidence during the examination by Court, goes unchallenged even on the part of the defence. Hence, it is for defence to explain injuries upon child, else shall be deemed to have been inflicted by appellant. The appellant has not explained the same in any manner. Therefore, reading evidence of P.W.6 and P.W.7 and this part of the evidence of P.W.5, the wife of appellant, it becomes crystal clear that the incident occurred without any grave and sudden provocation from any corner. The fatal blows were inflicted by accused on a child aged about 9 months, without any cause. That the fatal blows were inflicted with intention and knowledge of causing death and, therefore, the case would squarely be covered under Section 302 of IPC only. Hence, question of alteration of conviction from 302 to 304 of IPC does not arise.

In order to alter conviction, there must be cogent and concrete material on record to bring the case within the purview of exception 1 to Section 300 but neither we find any suggestion during cross-examination nor an iota of any other evidence, which may suggest that there was a

grave and sudden provocation at the relevant point of time. According to law, exception can be pressed into service when the death is caused of a person who was responsible for giving grave and sudden provocation and the provocation was such that the accused was deprived of power of self-control and committed the wrong. In this case, the deceased is a child aged about 9 months and, therefore, the question of grave and sudden provocation on his part does not arise. For the sake of arguments, even expanding interpretation under this exception and bringing the case within the exception by attributing grave and sudden provocation to any third party, then also the evidence on record does not permit us because the evidence of both the eye witnesses, P.W.6 and P.W.7, including that of P.W.5, the witness who turned hostile, does not suggest anything about grave and sudden provocation by any of the parties and, therefore, by no stretch of evidence on record, we cannot persuade ourselves to agree with Mr. Raval, learned advocate for the appellant, that the case is covered by exception 1 to Section 300 and thereby the appellant can be convicted under Section 304 of IPC only.

In the light of our discussion, we feel that the appeal is devoid of merits and must see its logical end. Accordingly, the appeal is dismissed and the sentence and conviction passed by the trial Court is confirmed.